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71-1497

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

LORETTA FAY BECK, *Petitioner,*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

LORETTA FAY BECK, *Petitioner,*

vs.

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit are not yet reported. The corrected original opinion dated October 21, 1971, is set out in Appendix A attached hereto on pages 16-18. The opinion denying rehearing, dated February 18, 1972, is set out on pages 19-20 of Appendix A.

Petitioner recovered judgment after a jury trial in the United States District Court for the Northern District of Texas at Fort Worth. (Appendix B, pp. 21-22,

attached hereto) No opinion exists with respect to that judgment. On March 8, 1972, pursuant to the mandate of the Court of Appeals, the District Court withdrew its original judgment for Petitioner and entered a "take nothing" judgment. (Appendix C, pp. 22-23 attached hereto)

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 21, 1971. A timely filed Petition for Rehearing and Rehearing En Banc was denied on February 18, 1972. This petition for certiorari was filed within ninety days of that date. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The decision of the Court of Appeals is in conflict with three Texas decisions cited in the footnote to the Opinion. (Appendix A, p. 17) In its Opinion on Rehearing, the Fifth Circuit states that its decision is in conflict with at least two recent Texas cases. The questions presented here are:

1. Whether the Court of Appeals should have followed the Texas decisions which apply the doctrines of waiver and estoppel?

2. Does the decision of the Court of Appeals establish a double standard in Texas between the state courts and the federal courts so as to grant insurance companies immunity from the doctrines of waiver and estoppel only in the federal courts?

3. Is there any justification for the Fifth Circuit's "Erie guess" that the Supreme Court of Texas would today reject the historic and universally accepted doctrines of waiver and estoppel?

STATEMENT

Suit was instituted by Petitioner Loretta Fay Beck in the United States District Court for the Northern District of Texas to recover the proceeds of a life insurance policy. Jurisdiction rested on diversity of citizenship. It is the duty of the federal courts to apply the Texas law as declared by the Texas Supreme Court and the intermediate Courts of Civil Appeals.[1]

The evidence established:

1. The insured, Jerry D. Beck, was not in good health at the time the policy was delivered.

2. Connecticut General had *knowledge* of Beck's illness prior to the time the policy was delivered and prior to the time it collected the full premiums.

3. Connecticut General, with notice of the grounds for voiding the policy, failed to rescind the policy and return the premiums during Beck's lifetime. See Appendix D (pp. 24-28) for a summary of the facts with references to the record.

After a jury trial, both parties made motions for judgment. Briefs were submitted to the District Court on whether Connecticut General had waived or was estopped to insist on a "good health" clause requiring

[1]Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487; Stoner v. N. Y. Life Ins. Co., 311 U.S. 464, 85 L. Ed. 284, 61 S. Ct. 336.

Beck to be in good health at the time the policy was delivered. All facts necessary to invoke the doctrines of waiver and estoppel were found by the jury and the District Court.[2] District Judge Leo Brewster, a distinguished member of the Texas Bar, held that under Texas law, Connecticut General had waived and was estopped to assert the provisions of the "good health" clause to void the policy. Judgment was entered for Petitioner for the proceeds of the policy, 12% penalty, attorney's fees, interest and costs.[3]

Petitioner contends that the doctrines of waiver and estoppel have been *consistently* applied against insurance companies in Texas for a century. In 1885 the Supreme Court of Texas explained the rationale for the doctrines:

> "To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to *attempt a fraud.*" Liverpool & London & Globe Ins. Co. v. Ende, 65 Tex. 118, 123 (Tex. 1885)

This language was quoted in *Lee v. Mutual Protective Ass'n. of Texas*, 47 S.W. 2d 402, Syl. 3, p. 404 (Tex. Civ. App. 1932 writ dism'd) and *Superior Ins. Co. v. Kling*, 321 S.W. 2d 151, pp. 155-156 (Tex. Civ. App. 1959, Aff'd. 327 S.W. 2d 422)

The Court of Appeals for the Fifth Circuit rejected

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[2]The material facts which invoked the doctrines of waiver and estoppel are summarized in paragraphs 4-8 in Appendix D attached hereto on pages 25-28.

[3]Appendix B, p. 21, Judgment of the District Court dated November 9, 1970.

Judge Brewster's view of the Texas law, ignored the rationale of the historic Texas decisions and sanctioned the fraud of Connecticut General. The $116,-034.22 judgment entered in favor of Petitioner was reversed on the sole ground that the Fifth Circuit is entitled to make an *"Erie guess"* that the Texas Supreme Court would today reject its prior decisions and hold that Connecticut General *cannot* waive or be estopped to assert the "good health" clause. The Fifth Circuit permitted Connecticut General to keep $833.05 in premiums and to avoid all liability — a new and shocking precedent. (Appendix C, pp. 22-23, Judgment Pursuant to Mandate)

REASONS FOR GRANTING WRIT

1. The Decision of the Court of Appeals for the Fifth Circuit is in Conflict With the Established Law of Texas.

The Fifth Circuit did not concern itself with the facts of this case—it held that the doctrines of waiver and estoppel no longer have application in Texas regardless of the facts. It admits that its decision is in conflict with five Texas decisions—three cited in the margin of its original Opinion and two cited in the Opinion on Rehearing.

2. The Opinion of October 21, 1971, Is Patently Absurd.

The Fifth Circuit tossed aside all Texas authorities on waiver and estoppel with the bizarre statement:

> "This is not the law in Texas as the following cases make clear."

It then cites three cases which do not support its conclusion. In fact, the doctrines of waiver and estoppel were zealously guarded in each of the three cases:

First Case: Washington Nat. Ins. Co. v. Craddock, 109 S.W. 2d 165 (Tex. 1937) deals with an accidental gunshot wound suffered by the insured *subsequent* to the delivery of the policy—not with an existing illness known to the insurer at the time the policy was delivered. The Supreme Court looked for facts which would invoke the doctrines and observed that: (p. 166)

> "* * * no consideration moved to it (the insurer) *after* the accident for the assumption of such liability. The insured seeks to create that liability by invoking the doctrine of waiver. That doctrine cannot be made to serve that purpose."

The Supreme Court was careful to point out those instances where the doctrine applies: (p. 166, bottom. first col.)

> "The cases where the doctrine of waiver, or estoppel, has been applied have largely been cases where the insurance companies have relied on a forfeiture of the contract, upon breaches of the warranties and conditions to work such forfeitures; and in many such cases this court and other courts of last resort have held that if the companies have led the other party, to his prejudice, to his expense, to understand that such forfeitures, such breaches of warranties and conditions, would not be insisted upon, then the companies would be estopped from asserting such defenses."

Second Case: Scott v. Industrial Life Ins. Co., 411 S.W. 2d 769 (Tex. Civ. App. 1967, no writ hist.) affirms the rules on waiver and estoppel; however, recovery is denied because the insured was not dead. Even in that absurd situation the Court of Appeals searched the record for facts which would invoke the rules on waiver and estoppel and stated: (Syl. 3, p. 773)

> "Our review of this record reveals no evidence to demonstrate the application of the rule sought to be applied by appellant."

Third Case: Powell v. American Casualty & Life Co., 250 S.W. 2d 744 (Tex. Civ. App. 1952, writ ref'd. n.r.e.), is not in point because the policy had lapsed for non-payment of premiums. The question of whether the insurer knew of Powell's illness at the time the policy was issued is not in the case. The Dallas Court of Civil Appeals again recognized the doctrine of estoppel and explained why it had no application: (p. 746)

> "One of the essential elements of estoppel is that the party asserting it must have been misled or caused to change his position to his injury."

Analyzing the three cases relied on by the Fifth Circuit, it is obvious that:

(1) the facts necessary to invoke the doctrines of waiver and estoppel were missing in each case;

(2) Texas courts have zealously guarded the doctrines of waiver and estoppel;

(3) there is no dicta or other indication in any of the cases that the doctrines will ever be questioned or abandoned.

While the Fifth Circuit failed to notice the language in its authorities which supported the doctrines, it did recognize that at least three Texas cases were in conflict with its decision. The Fifth Circuit dismissed the conflict as follows:

> "To the extent that the cases cited in the margin would support appellee's position they have been overruled by the above cited cases."

That statement is utter nonsense! The three "*overruled*" cases continue to be cited as controlling by the Texas courts.[4] There is no conflict between any of the authorities cited.

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[4]*First "Overruled" Case: National Aid Life Ass'n. v. Murphy*, 78 S.W. 2d 223 (Tex. Civ. App. 1934, writ dism'd) has been cited in *fifteen* Texas decisions as of March, 1972. In 1957 the Texas Supreme Court cited the Murphy case in *Texas Prudential Ins. Co. v. Dillard*, 307 S.W. 2d 242, 252 (Tex. 1957) and gave no indication that rule had ever been questioned or would ever be questioned. The Fifth Circuit obviously misread the Scott case when it cited it as an authority overruling the Murphy case.

Second "Overruled" Case: Terry v. Texas Prudential Ins. Co., 77 S.W. 2d 761 (Tex. Civ. App. 1934, writ dism'd) has been cited over *twenty* times. In 1944 the Texas Supreme Court quoted from the Terry case in *Hassell v. Commonwealth Casualty & Ins. Co.*, 184 S.W. 2d 917, 919 (Tex. 1945).

Third "Overruled" Case: Southern Underwriters v. Jones, 13 S.W. 2d 435 (Tex. Civ. App. 1929, writ ref'd) is one of *fifty* authorities cited in 1962 in *Mims v. Houston Fire & Casualty Co.*, 362 S.W. 2d 880 (Tex. Civ. App. 1962, no hist) for the proposition that the doctrines will be applied when (p. 882) "The facts necessary to show a waiver and estoppel are not in dispute". The Mims case contains one of the largest lists of Texas authorities in point.

3. The Opinion on Rehearing—The "Erie Guess" Is Not Justified By Any Dicta, Doubt, or Ambiguities.

On rehearing the Fifth Circuit recognized that it's decision was in conflict with the 1957 Dillard decision and the 1963 Erwin decision; however, it concluded:

> "Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision."

As authority for its "*Erie* guess", the Fifth Circuit cited *Bennett v. National Life & Accident Ins. Co.*, 438 S.W. 2d 438, (Tex. Civ. App. — 1969, writ dism'd). The Bennett case is not in point nor is it in conflict with any decision of the Texas Supreme Court. The Bennett opinion clearly points out that the company was not charged with knowledge of the insured's bad health *at the time the policy was delivered.* The Bennett decision rests on the decision in *Great Nat'l. Life Ins. Co. v. Hulme,* 136 S.W. 2d 602 (Tex. 1940) in which the Supreme Court was careful to point out the lack of "knowledge" on the part of the insurer at the time its policy was delivered: (p. 603, 604)

> "* * * Sometime *after the policy was delivered,* but before Mrs. Hulme died, the company learned for the *first time,* that Mrs. Hulme was afflicted with heart trouble when she made application for insurance and at the time the policy was delivered. Upon learning this, the company *promptly* repudiated all liability under the policy, tendered back the premiums which had been paid, and did

not accept any premium after that." (Emphasis added.)

In this instance, Connecticut General had actual knowledge that Beck was ill prior to the time the policy was delivered. It is charged with the knowledge of its agent,[5] its manager, as well as the information contained in its home office file indicating that Beck was ill when the policy was delivered. It did nothing to repudiate the policy while Beck was alive. See Appendix D, paragraphs 4-7, pp. 25-27, for references to the record.

There is no dicta, doubts or ambiguities in any Texas decision which can serve as the basis of the Fifth Circuit's "Erie guess".

4. No Guessing Required: Texas Courts Have Consistently Applied At Least Two Rules on Waiver and Estoppel.

RULE ONE: *Delivery of the policy with knowledge of the insured's illness waives a good health clause.*

The most recent Texas case recognizing the *consistency* of the application of this rule is *Republic Ins.*

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[5]The circumstances under which the agent's knowledge is imputed to the insurer were discussed by the Fifth Circuit in *Southern Farm Bureau Casualty Ins. Co. v. Allen*, 388 F.2d 126 (5th CCA 1967) pp. 129-130 (Syl. 3-5): Also see: *Adams v. LaSalle Life Ins. Co.*, 99 S.W. 2d 386 (Tex. Civ. App. – 1936, writ dism'd) p. 388 (Syl. 1-7); *Hassell v. Commonwealth Cas. & Ins. Co.*, 184 S.W. 2d 917, 919 (Tex. 1945); *Germania Mutual Aid Ass'n. v. Trotti*, 318 S.W. 2d 918 (Tex. Civ. App. – 1958, no hist.); *Old Colony Ins. Co. v. Messer*, 328 S.W. 2d 335, 337 (Tex. Civ. App. – 1959, writ ref'd. n.r.e.); *National Life Ass. Co. of Texas v. Neves*, 370 S.W. 2d 144 (Tex. Civ. App. – 1963, writ ref'd. n.r.e.); *Farmers Mutual Protective Ass'n. v. Pack*, 465 S.W. 2d 228 (Tex. Civ. App. 1971, writ ref'd. n.r.e.).

Co. v. Silverton Elevators, Inc., 477 S.W. 2d 336, (Tex. Civ. App., Feb. 14, 1972, Rehearing denied March 13, 1972, Application for writ of error pending) Justice Reynold states: (Syl. 1, pp. 337-338)

> "The rule (on waiver and estoppel) has been followed *consistently* in Texas. * * * The rationale for the rule is that an insurance company may not deliver a policy with full knowledge of facts upon which liability thereunder may be disputed and then insist upon these facts in avoidance of the liability undertaken. Such course of action is an assertion that the policy is valid at time of delivery and is a waiver of the known ground of invalidity by which the insurer is estopped from defeating an action brought on the policy by that defense."

In February, 1972, the Erwin case which the Fifth Circuit noted, but refused to follow, was cited in *Minnesota Mutual Life Ins. Co. v. Morse*, 476 S.W. 2d 753, 758 (Tex. Civ. App. — Feb. 1972, Application for writ of error pending) as an authority for waiver and estoppel.

In *Lee v. Mutual Protective Ass'n. of Texas*, 47 S.W. 2d 402 (Tex. Civ. App. — 1932, writ dism'd. Syl. 3) the Court used italics to stress that a good health clause is a "*condition precedent which may be waived*". Knowledge that the insured was "*in bed part of the time*" was sufficient to give the insurance company notice of her ill health.

The rule, rephrased in terms of this case, is:

> When Connecticut General delivered its policy to Beck, accepted and retained premiums thereon

> with knowledge of his illness, it may not insist on the provisions of a good health clause which would invalidate the policy from its inception. Delivery of the policy with such knowledge constitutes a waiver of any good health clause or of any policy conditions inconsistent with the known facts. Connecticut General is estopped thereafter from asserting the breach of such conditions.

Other Texas cases announcing this rule are: *Terry v. Texas Prudential Ins. Co.,** 77 S.W. 2d 761 (Tex. Civ. App. — 1934, writ dism'd) Syl. 2, p. 764; *Texas Prudential Ins. Co. v. Dillard***, 307 S.W. 2d 242 (Tex. 1957); *Legal Security Life Ins. Co. v. Erwin,*** 372 S.W. 2d 750, (Tex. Civ. App. — 1963, writ ref'd. n.r.e.); *Perry v. Citizens Life Ins. Co.*, 163 S.W. 2d 743 (Tex. Civ. App. — 1942, no hist.) Syl. 3, 4, p. 747; and *Southern Underwriters v. Jones,** 13 S.W. 2d 435, Syl. 1 (Tex. Civ. App. — 1929, writ ref'd). Also see: *Baker v. Fort Worth Mutual Benev. Ass'n.*, 280 S.W. 165, 169 (Tex. 1926); *Wirtz v. Sovereign Camp W.O.W.*, 268 S.W. 438, Syl. 12, 13, p. 441; (Tex. 1925); *Germania Mutual Aid Ass'n. v. Trotti*, 318 S.W. 2d 918 (Tex. Civ. App. 1958 — no writ hist); *Old Colony Ins. Co. v. Messer*, 328 S.W. 2d 335, 337 (Tex. Civ. App. — 1959, writ ref'd. n.r.e.); *Mims v. Houston Fire & Casualty Ins. Co.*, 362 S.W. 2d 880 (Tex. Civ. App. — 1962, no writ hist.) and the fifty authorities cited therein; *Farmers Mutual Protective Ass'n. v. Pack*, 465 S.W. 2d 228 (Tex. Civ.

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*Cited in the margin of the Fifth Circuit's Opinion as being overruled.

**Cited by the Fifth Circuit on rehearing as being in conflict wth its decision.

App. — 1971, writ ref'd. n.r.e.); 32 Tex. Jur. 2d 408, 416, Secs. 243-246.

The respect which Texas courts have for this rule is apparent by the number of times each of the above authorities have been cited. (See Shepard's Texas Citations.)

RULE TWO: *Waiver by Election of Defense.*

The second rule on waiver was recently stated in *Lancon v. Employers Nat. Life Ins. Co.*, 424 S.W. 2d 321 (Tex. Civ. App. — 1968, writ ref'd. n.r.e.) On page 322 the Court states: (Syl. 1)

> "Where the company denies liability or refuses to pay a loss on a specified ground, it is estopped to assert other grounds relieving it from liability of which it had full knowledge where insured has acted on its position as announced and suffered resultant detriment, or, as the rule is sometimes more broadly stated, *when one specific ground of forfeiture is urged against a policy of insurance and the validity thereof denied on that ground alone, all other grounds are waived.*" (Emphasis added)

This is the same rule announced in *Nat'l. Aid Life Ass'n. v. Murphy,** 78 S.W. 2d 223, 227 (Tex. Civ. App. — 1934, writ dism'd). *Woodmen of the World Life Ins. Soc. v. Armstrong*, 170 S.W. 2d 526, 529 (Syl. 3) (Tex. Civ. App. — 1943, writ ref'd) and *Great American Indemnity Co. v. McMenamin*, 134 S.W. 2d 734, 737 (Syl. 4) (Tex. Civ. App. — 1939, writ dism'd. Judgment correct).

There is no evidence that the Supreme Court of Texas would reject the wholesome, respected, and historic rules designed to protect the public against the fraud of an insurance company.

5. The Importance of the Question.

If the Fifth Circuit's decision is allowed to stand, how long will it be before a beneficiary will be afforded the protection of the doctrine of waiver and estoppel in the federal courts?

Mr. Justice Holmes once observed:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[6]

It would indeed be a "misfortune" if the Fifth Circuit's decision became the law of the federal courts in Texas.

Since the security of almost every family depends to some extent on life insurance, the decision assumes an importance far beyond the particular facts and parties here involved.

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[6] *Hyde v. United States*, 225 U.S. 347, 391.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A.

CORRECTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1330

LORETTA FAY BECK,
Plaintiff-Appellee,

versus

CONNECTICUT GENERAL LIFE
INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

(October 21, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: Defendant-appellant, Connecticut General Life Insurance Co. (Connecticut General), issued a life insurance policy to Jerry D. Beck, who the jury found was not in good health at the time of the delivery of the policy. Connecticut General denied liability on the policy subsequent to the death of Beck, but Mrs. Beck, the beneficiary, sued and recovered on the policy in the court below. We reverse with directions that judgment be entered for Connecticut General.

The usual "good health" clause in a life insurance policy provides that the policy is null and void if the insured is not in good health at the time the policy is delivered to him. Connecticut General urges that its "good health" clause precludes liability in this case since good health is a condition precedent to the validity of the policy under applicable Texas law. We agree. *Great National Life Insurance Co. v. Hulme*, 136 S.W. 2d 602 (Tex. 1940); *American National Insurance Co. v. Lawson*, 127 S.W.2d 294 (Tex. 1939). Appellee Beck contends, however, that this condition precedent can be waived or that the company can be estopped to assert it. This is not the law of Texas, as the following cases make clear. *Washington Nat. Ins. Co. v. Craddock*, 109 S.W.2d 165 (Tex. 1937); *Scott v. Industrial Life Ins. Co.*, 411 S.W.2d 769 (Tex.Civ.App. — Dallas 1961, no writ); *Powell v. American Casualty & Life Co.*, 250 S.W.2d 744 (Tex.Civ.App. — Dallas 1952, writ ref'd. n.r.e). To the extent that the cases cited in the margin would support appellee's position,[1] they have been overruled by the above cited cases.

Mrs. Beck argues in the alternative that the provisions in this particular policy are not such as would constitute the typical good health clause covered by Texas law. The clause she recites reads as follows: "The policy shall not take effect until the policy has been delivered and the first premium paid as above provided during the lifetime of the Insured and prior to any change in his health as shown in the applica-

[1]National Aid Life Ass'n v. Murphy, 78 S.W.2d 223 (Tex.Civ. App.-Dallas 1934, writ dism'd); Terry v. Texas Prudential Ins. Co., 77 S.W. 2d 761 (Tex.Civ.App.-El Paso 1934, writ dism'd); Southern Underwriters v. Jones, 13 S.W.2d 435 (Tex. Civ.App.-Waco 1929, writ ref'd).

tion." Mrs. Beck fails to note, however, the further provision in the application which became a part of the policy: ". . . no insurance shall take effect unless and until the policy has been manually delivered to and received and accepted by me (us) and the first premium paid during lifetime and good health of the proposed insured . . ." These clauses are in no way conflicting or repugnant. Read together as they must be, they have the same effect of the good health provisions dealt with by the Texas authorities set out above.

Beck finally contends that Connecticut General has raised its good health defense too late, i.e., the defense was not raised until after the trial. This contention is without merit. The defense was raised in the pleadings and was submitted to the jury without objection.

In view of this disposition of the case, it is unnecessary to consider the other points raised by Connecticut General. Therefore, the judgment of the district court is

REVERSED WITH DIRECTIONS.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1330

LORETTA FAY BECK,
Plaintiff-Appellee,

versus

CONNECTICUT GENERAL LIFE
INSURANCE COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion October 21, 1971, 5 Cir., 1971, — F.2d —).

(February 18, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: In her petition for rehearing Mrs. Beck brought to our attention several Texas decisions not originally cited. Most are distinguishable, but two are not. In *Texas Prudential Ins. Co. v. Dillard*, 307 S.W.2d 242 (Tex. 1957), the Texas Supreme Court, speaking in dicta, quoted with apparent approval an earlier Court of Civil Appeals case which held that waiver and estoppel could be applied against an insurance company that delivered a policy to an insured

with knowledge that he was in bad health. In *Legal Security Life Ins. Co. v. Erwin*, 372 S.W.2d 750 (Tex. Civ.App. — Texarkana 1963, writ ref'd n.r.e), the Court of Civil Appeals applied waiver and estoppel to prevent an insurance company from asserting a good health clause when it knew at the time the policy was delivered the insured was afflicted with arthritis. On the other hand, *Bennett v. National Life and Accident Ins. Co.*, 438 S.W.2d 438 (Tex.Civ.App.—Dallas 1969, writ dism'd) has been pointed to by Connecticut General as being consonant with our holding.

Although the former two cases clearly raise a doubt as to what the Supreme Court of Texas would hold the applicable rule of law to be today, we continue to believe our initial *Erie* guess to be the correct prediction and therefore adhere to our original decision.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1313

LORETTA FAY BECK
versus
CONNECTICUT GENERAL LIFE
INSURANCE COMPANY

Judgment

The issues in this case have been duly litigated in an evidentiary trial before the Court and a jury, after proper notice to both parties, with the plaintiff and her attorneys and the attorneys for the defendant present and participating. The jury's verdict in the form of answers to special interrogatories has been received and filed. Based upon such verdict and the facts established by the evidence beyond question, the Court is of the opinion that the plaintiff is entitled to judgment against the defendant for $78,240.00, representing the face amount of the policy sued upon, $9,308.80, representing the 12 per cent Texas statutory penalty, $8,485.52, representing interest due on the face amount of the policy from December 31, 1968, to November 9, 1970, and $20,000.00, representing a reasonable attorneys fee, all of which totals $116,034.-32.

It is therefore decreed that the plaintiff, Loretta

Fay Beck, recover from the defendant, Connecticut General Life Insurance ompany, the sum of $116,-034.32, together with interest thereon at the rate of 6 per cent per annum from this date.

It is further ordered that the costs of this suit be taxed against the defendant.

Signed, November 9, 1970.

/s/ Leo Brewster
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA 4-1313

LORETTA FAY BECK
versus
CONNECTICUT GENERAL LIFE
INSURANCE COMPANY

JUDGMENT PURSUANT TO MANDATE

The issues in this case have been duly litigated in an evidentiary trial before the Court and a jury, after proper notice to both parties, with the plaintiff and her attorneys and the attorneys for the defendant present and participating. The jury's verdict in the form of answers to special interrogatories was received and filed. Based upon such verdict and the facts established by the evidence beyond question, the Court was of the

opinion that the plaintiff was entitled to judgment and judgment was so entered. Thereafter, upon appeal the United States Court of Appeals for the Fifth Circuit reversed the case with directions that judgment be entered for the defendant, Connecticut General Life Insurance Company. The plaintiff's petition for rehearing having been denied by the Court of Appeals on February 18, 1972 and mandate having issued to this Court on February 28, 1972, it is therefore

ORDERED and DECREED that the judgment heretofore signed herein on November 9, 1970 be and it hereby is withdrawn and superseded; that the plaintiff take nothing by her suit; that judgment is hereby rendered for the defendant; and that costs of this suit be taxed against the plaintiff.

SIGNED March 8th, 1972.

/s/ Leo Brewster
JUDGE

APPENDIX D

SUMMARY OF THE FACTS[7]

The sequence of events leading to this dispute are:

(1) SALE OF THE ESTATE PLAN: Connecticut General's agent, Joseph R. Snelus, as a "Business & Estate Analyst", contacted Jerry D. Beck and after obtaining the necessary information, prepared "Estate Plan No. 26512". (R. 59, 419, 422-424) The plan consisted of a sales pitch for two insurance policies — the life insurance policy in question and a monthly income disability policy.

On July 22, 1968, Snelus took Beck's application for both policies, collected initial premiums and issued the company's "Conditional Receipt" for the initial premiums. (R. 5, Exhibit A)

(2) THE MEDICAL EXAMINATION: On September 5, 1968, Beck was examined by Connecticut General's medical examiner, Dr. Paul Rattan. (R. 98-99) Except for being overweight, Beck appeared to be in good health. (R. 113) Dr. Rattan completed part II of the application for insurance (medical history) (R. 23, 119) At the trial, Connecticut General sought to void the policy on the grounds that Beck knowingly made false statements in giving his medical history. (R. 42-44, First Affirmative Defense) The jury found against Connecticut General on these issues. (R. 521-525, Questions 1-5)

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[7] "R" references are to the printed Appendix used in the Court of Appeals. Exhibits were omitted from the appendix, but may be found in the two volume transcript of proceedings referenced as "Tr.", which was prepared by the Court Reporter and filed in the Court of Appeals.

(3) BECK'S ILLNESS: On the night of September 16, 1968, Beck "woke up with a sick stomach" (R. 65) which was thought to be a virus or gastroenteritis. (R. 163, 164) The family doctor put Beck in a local hospital for examination and found that he did not have blood pressure in his left arm. Beck recovered from his "sick stomach" and tests were made at Stephens Park Hospital in Dallas to diagnose the circulatory problem.

ELEMENTS OF WAIVER AND ESTOPPEL

(4) CONNECTICUT GENERAL HAD NOTICE OF BECK'S ILLNESS PRIOR TO DELIVERING THE POLICIES AND COLLECTING THE FULL PREMIUMS: Sometime before September 25, 1968, Beck telephoned Snelus and told the agent of his illness, that he was in or had just gotten out of the hospital, that he had a problem with poor circulation and was taking drugs to dilate his blood vessels and improve circulation. (R. 432-433, 456) The agent was also informed that Beck was scheduled to go to Baylor University Medical Center later in October for additional studies and tests. (R. 435) Snelus recalled having a discussion prior to September 25, 1968, with Mr. D. W. (Doug) Kaats, Connecticut General's Branch Manager, in which Beck's illness was mentioned as well as the fact that Beck was taking drugs to improve his circulation. (R. 433, 456) Kaats telephoned and wrote the home office a number of times after September 17, 1968, about Beck's coverage and illness. (R. 459-460) The policies were released to the agent for delivery to Beck around October 1, 1968.

(5) POLICIES DELIVERED AND PREMIUMS COLLECTED IN OCTOBER AFTER CONNECTICUT GENERAL ACQUIRED KNOWLEDGE OF BECK'S ILLNESS: Connecticut General delivered the policies to Beck in October, 1968. (R. 434) It collected an additional $718.25 in premiums on October 7, 1968. (Plaintiff's Exhibits 3, 4 and 5, Tr. 14-16) $542 of this amount was for the balance of the first year's premium on the life insurance policy in question.

(6) REFUSAL TO RESCIND: After delivery of the policies, Snelus and his manager, Kaats, anticipated that Beck would make claim under the monthly income disability policy. Kaats again telephoned the home office on October 22, 1968, and stressed the fact that Beck was ill, that he had been off work since September 20 and was going back into the hospital for further tests. Instead of immediately rescinding the policy under the good health clause, refunding the premiums and asking the agent to pick up the policies, the home office wrote Kaats: (Tr. 349, Plaintiff's Exhibit 16)

> "On October 22 you called regarding the above-named for whom we issued an MI contract in September. You indicated to me that *Mr. Beck had became ill around September 20 and although he had not worked since that date,* there was some question regarding disability because your agent had learned that he had been spending some time fishing. The point of your call was that *Beck was going back to the hospital* and there, obviously, would be a question regarding any potential claim during the period of time immediately subsequent to issue."

Connecticut General is burdened with the knowledge of its agent Snelus, the knowledge of its manager Kaats, (all acquired prior to delivery of the policies) as well as the actual knowledge of Beck's illness as shown in its home office files. In addition, the jury found that Connecticut General, with notice of the facts, could have rescinded the policy during Beck's lifetime. (R. 527, Question No. 8)

(7) BECK'S DEATH: Beck was admitted to the Baylor University Medical Center on October 29, 1968. He underwent extensive tests and studies and was discharged on November 6, 1968. He was told that he had a "heart like a 16 year old". (R. 321, 458) Beck returned to work and on November 16, 1968, at age 34, died unexpectedly. No autopsy was performed.

(8) ELECTION OF DEFENSES: Petitioner filed a claim for the life insurance proceeds in December, 1968. Seven months later, in June, 1969, Connecticut General denied the claim on the grounds that Beck had fraudulently misrepresented his medical history to Dr. Rattan. (Tr. 417, Plaintiff's Exhibits 30 and 31) The so-called "good health" clause found in the application (R. 22) or the policy provision concerning a "change of health" were not mentioned. (R. 8, second paragraph) When suit was filed, Connecticut General answered and elected to raise the single defense based on Beck's representations concerning his medical history. It has never plead that there was a condition precedent in the policy. On July 14, 1970, pursuant to Rule 16, F.R.C.P., a pre-trial order was entered which limited Connecticut General's defense to fraud. Depositions

were then taken of the medical witnesses and the case prepared for trial on the theory that Petitioner need only show that her husband had not been guilty of making fraudulent statements to Dr. Rattan. At the trial, when it appeared that Connecticut General might raise a defense based on an implied good health clause or the clause contained in the conditional receipt, Petitioner, with leave of Court, filed a supplemental answer alleging waiver of those defenses. (R. 48-50)